

**A Abdul Rashid bin Mohamad Isa v PTT International Trading
Pte Ltd**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO B-03(IM)(NCC)-76-07 OF 2022
RAVINTHRAN, HASHIM HAMZAH AND LIM CHONG FONG JJCA
21 FEBRUARY 2024

C *Bankruptcy — Creditor's petition — Withdrawal of — Registrar decided since
judgment creditor withdrawn creditor's petition, bankruptcy action against
judgment debtor came to end — High Court allowed judgment creditor's appeal
— Appeal by judgment debtor against High Court's decision — Whether
D withdrawal of creditor's petition would terminate and end bankruptcy proceeding
against judgment debtor*

On 17 December 2018, the judgment creditor ('JC') served a bankruptcy
notice to the judgment debtor ('JD') for an amount of RM59,567,505.93, and
E the JD had seven days from the date of its service to reply and make payment.
The JD filed a summons in chambers to set aside the bankruptcy notice but did
not file any affidavit under r 93(1) of the Insolvency Rules 2017 ('the IR'). The
learned registrar found that the JD had committed an act of bankruptcy on
25 December 2018 because the JD did not file any affidavit and did not make
F any payment of the outstanding sum stated in the bankruptcy notice to the JC.
Consequently, the JD filed an appeal to the judge in chambers against the
decision while the JC filed a creditor's petition against the JD. The learned
High Court judge ('HCJ') allowed the JD's appeal and held that there was no
act of bankruptcy because the JD had already applied to set aside the
G bankruptcy notice. The JC thus decided to withdraw the creditor's petition.
The learned registrar allowed the JC's application to withdraw the creditor's
petition with the liberty to file afresh. However, the learned registrar also
decided that: (a) since the JC had withdrawn the creditor's petition, the
bankruptcy action against the JD came to an end; and (b) the JC was already
H out of time to file any creditor's petition since the act of bankruptcy had
occurred on 25 December 2018. Aggrieved, the JC filed an appeal to the judge
in chambers while the JD applied to set aside the JC's appeal. The HCJ had
allowed the JC's appeal and dismissed the JD's application. Hence, this appeal.
I The issue for determination was whether the HCJ had erred in fact and law in
failing to appreciate that the withdrawal of the creditor's petition would
terminate and end the bankruptcy proceeding against the JD.

Held, dismissing the appeal with costs:

- (1) Even though the amount stated in the bankruptcy notice was not paid within seven days, an application to set aside the bankruptcy notice under r 17 of the IR was already filed by the JD before 25 December 2018 through encl 6. The act of bankruptcy did not occur on 25 December 2018, as there was a pending application to set aside the bankruptcy notice. This was regardless of whether the application was made under r 17 of the IR or otherwise since it came within the ambit of r 93 of the IR. Therefore, the act of bankruptcy could not occur until encl 6 was heard and disposed of. Since encl 6 had not been heard and disposed of, the act of bankruptcy had been stayed according to r 93 of the IR and thus it was premature at this stage to argue that the bankruptcy proceeding had terminated especially when the earlier petition was withdrawn with liberty to file afresh (see paras 23 & 26–27).

[Bahasa Malaysia summary]

Pada 17 Disember 2018, pemiutang penghakiman ('JC') menyampaikan notis kebangkrutan kepada penghutang penghakiman ('JD') untuk jumlah RM59,567,505.93, dan JD mempunyai tujuh hari dari tarikh penyampaian untuk menjawab dan membuat bayaran. JD memfailkan saman dalam kamar untuk mengetepikan notis kebangkrutan tetapi tidak memfailkan sebarang affidavit di bawah k 93(1) Kaedah-Kaedah Insolvensi 2017 ('KI'). Pendaftar yang bijaksana mendapati JD telah melakukan tindakan kebangkrutan pada 25 Disember 2018 kerana JD tidak memfailkan sebarang affidavit dan tidak membuat sebarang pembayaran jumlah tertunggak yang dinyatakan dalam notis kebangkrutan kepada JC. Akibatnya, JD memfailkan rayuan kepada hakim dalam kamar terhadap keputusan itu manakala JC memfailkan petisyen pemiutang terhadap JD. Hakim Mahkamah Tinggi yang bijaksana ('HMT') membenarkan rayuan JD dan memutuskan bahawa tiada tindakan kebangkrutan kerana JD telah pun memohon untuk mengetepikan notis kebangkrutan. JC dengan itu memutuskan untuk menarik balik petisyen pemiutang. Pendaftar yang bijaksana membenarkan permohonan JC untuk menarik balik petisyen pemiutang dengan kebebasan untuk memfailkan semula. Walau bagaimanapun, pendaftar yang bijaksana juga memutuskan bahawa: (a) memandangkan JC telah menarik balik petisyen pemiutang, tindakan kebangkrutan terhadap JD telah berakhir; dan (b) JC sudah kesuntukan masa untuk memfailkan mana-mana petisyen pemiutang kerana tindakan kebangkrutan telah berlaku pada 25 Disember 2018. Terkilan, JC memfailkan rayuan kepada hakim dalam kamar manakala JD memohon untuk mengetepikan rayuan JC. HMT telah membenarkan rayuan JC dan menolak permohonan JD. Oleh itu, rayuan ini. Isu untuk penentuan adalah sama ada HMT telah terkhilaf dalam fakta dan undang-undang kerana gagal untuk menghargai bahawa penarikan balik petisyen pemiutang akan menamatkan dan mengakhiri prosiding kebangkrutan terhadap JD.

Diputuskan, menolak rayuan dengan kos:

- A (1) Walaupun jumlah yang dinyatakan dalam notis kebangkrapan tidak dibayar dalam tempoh tujuh hari, permohonan untuk mengetepikan notis kebangkrapan di bawah k 17 KI telah pun difailkan oleh JD sebelum 25 Disember 2018 melalui lampiran 6. Tindakan kebangkrapan tidak berlaku pada 25 Disember 2018, kerana terdapat permohonan belum selesai untuk mengetepikan notis kebangkrapan. Ini tidak kira sama ada permohonan itu dibuat di bawah k 17 KI atau sebaliknya kerana ia datang dalam lingkungan k 93 KI. Oleh itu, tindakan kebangkrapan tidak boleh berlaku sehingga lampiran 6 didengar dan dilupuskan. Oleh kerana lampiran 6 tidak didengar dan dilupuskan, tindakan kebangkrapan telah ditangguhkan mengikut k 93 KI dan oleh itu adalah terlalu awal pada peringkat ini untuk berhujah bahawa prosiding kebangkrapan telah ditamatkan terutamanya apabila petisyen terdahulu ditarik balik dengan kebebasan untuk memfailkan semula (lihat perenggan 23 & 26–27).]
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- C

D **Cases referred to**

Subramaniam all Paidathally, Re; ex parte G Ragumaren & Co [2011] MLJU 1216; [2011] 1 LNS 1594, HC (distd)

Legislation referred to

- E Insolvency Act 1967 s 3(1)(i)
Insolvency Rules 2017 rr 17, 93, 93(1), (2)

Appeal from: *Abdul Rashid bin Mohamad Isa v PTT International Trading Pte Ltd* [2020] MLJU 146 (High Court, Kuala Lumpur)

- F *Chan Siew Cheong (Teh & Lee) for the appellant.*
Neo Chi Chyn (Firoz Julian) for the respondent.

Hashim Hamzah JCA:

- G INTRODUCTION

[1] For ease of reference, the parties in this appeal shall be referred to as they were before the High Court below.

- H [2] This is the judgment debtor's ('JD') appeal against the decision of the learned High Court judge ('HCJ') delivered on 22 June 2022 in which the judgment creditor's ('JC') appeal to the judge in chambers was allowed.

- I BRIEF FACTS

[3] Briefly, the facts leading to the present appeal are as follows.

[4] On 17 December 2018, the JC served a bankruptcy notice to the JD for

an amount of RM59,567,505.93, and the JD had seven days from the date of service to reply and make payment (until 24 December 2018). A

[5] On 21 December 2018, the JD filed a summons in chambers to set aside the bankruptcy notice. However, the JD did not file any affidavit under r 93(1) of the Insolvency Rules 2017 ('the IR 2017'). B

[6] On 22 January 2019, the learned registrar found that the JD had committed an act of bankruptcy on 25 December 2018 because the JD did not file any affidavit under r 93(1) of the IR 2017 and did not make any payment of the outstanding sum stated in the bankruptcy notice to the JC. Consequently, the JD filed an appeal to the judge in chambers against the said decision. C

[7] On 19 June 2019, the JC filed a creditor's petition against the JD. D

[8] On 7 October 2020, the learned HCJ allowed the JD's appeal and held that there was no act of bankruptcy because the JD had already applied to set aside the bankruptcy notice. E

[9] On 5 December 2021, the JC informed the court that it would like to withdraw the creditor's petition since the High Court held that there was no act of bankruptcy on the part of the JD. F

[10] On 6 December 2021, the learned registrar allowed the JC's application to withdraw the creditor's petition with the liberty to file afresh. However, the learned registrar also decided that since the JC had withdrawn the creditor's petition, the bankruptcy action against the JD came to an end, and the JC was already out of time to file any creditor's petition since the act of bankruptcy had occurred on 25 December 2018. G

[11] Dissatisfied with the decision of the learned registrar, the JC filed an appeal to the judge in chambers on 17 December 2021. On the other hand, the JD applied to set aside the JC's appeal. The JC's appeal and the JD's application to set aside the appeal were heard together. H

[12] On 22 June 2022, after hearing both parties, the learned HCJ had allowed the JC's appeal and dismissed the JD's application to set aside the appeal. The JD then appealed against the decision of the learned HCJ. The appeal was heard before us. I

A ISSUES

[13] The core issue in the instant appeal is whether the learned HCJ had erred in fact and law in failing to appreciate that the withdrawal of the creditor's petition would terminate and end the bankruptcy proceeding against the JD.

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OUR FINDINGS

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[14] The learned counsel for the JD submitted that the learned HCJ failed to appreciate that the withdrawal of the creditor's petition would terminate and end the bankruptcy proceeding against the JD.

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[15] The learned counsel for the JD cited *Re Subramaniam a/l Paidathally; ex parte G Ragumaren & Co* [2011] MLJU 1216; [2011] 1 LNS 1594 in support of their submission.

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[16] In *Re Subramaniam*, the learned registrar had struck out the first judgment creditor's petition, which was grounded on the error in stating the correct date of the judgment debtor's act of bankruptcy. The judgment creditor did not appeal against the decision but instead filed a second creditor's petition based on the corrected date of the judgment debtor's act of bankruptcy.

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[17] The registrar proceeded to strike out the second creditor's petition on the ground that the judgment creditor could not file another creditor's petition based on the same act of bankruptcy once the first creditor's petition was dismissed. The recourse available to the judgment creditor was either to appeal against the dismissal or to start the proceeding afresh. On appeal, the learned HCJ had affirmed the decision of the registrar and dismissed the judgment creditor's appeal.

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[18] The above mentioned case was cited by learned counsel for the JD for the proposition that once a creditor petition is struck out or withdrawn, the bankruptcy proceedings will come to an end and a subsequent creditor petition cannot be filed based on the same act of bankruptcy that was relied upon by the earlier creditor petition. Thus, even if six months had not lapsed from the date of the act of bankruptcy, a subsequent petition cannot be filed. In *Re Subramaniam*, the learned High Court judge acknowledged that there is no express provision in the Bankruptcy Act on this question. Be that as it may, His Lordship ruled that a second petition cannot be filed based on the same act of bankruptcy as the first petition terminated all bankruptcy proceedings. However, in our opinion, the above mentioned case can be distinguished on the facts for the following reasons.

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[19] In *Re Subramaniam*, because of the uncorrected mistake as to the date of

bankruptcy, the JD filed an application to strike out the bankruptcy petition. In the instant case, there is no issue of a mistake in respect of the date of bankruptcy on the part of the JC. It was the registrar who 'declared' that the act of bankruptcy was committed on 25 December 2018 although the application of the JD to set aside the BN was still pending. This mistake of the registrar was corrected by the learned High Court judge on 7 October 2020. The JD then moved to strike out the creditor petition but the JC was allowed to withdraw the petition with liberty to file afresh. In *Re Subramaniam*, the creditor petition was struck out by the registrar without any reservation of the right of the JC to refile the petition. Therefore, we are of the view, that as the creditor petition was withdrawn with liberty to file afresh, a second creditor petition which complies with the six month period from the date of the act of bankruptcy is proper and cannot be objected to.

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[20] As such, we conclude that the decision in *Re Subramaniam* does not assist the JD in this present appeal.

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[21] Based on r 93(2) of the IR 2017, until the application to set aside the bankruptcy notice has been heard and determined, no act of bankruptcy under the notice shall be deemed to have been committed.

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[22] Reverting to the facts of the present case, we are of the considered view that the crucial facts are as follows. Firstly, the bankruptcy notice was issued on 17 December 2018. Therefore, if there was any non-compliance with the bankruptcy notice under s 3(1)(i) of the Insolvency Act 1967 (Revised 1988) (Act 360) or if no application to set aside the bankruptcy notice has been made under r 93 of the IR 2017, the act of bankruptcy would have occurred on 25 December 2018.

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[23] In the present case, even though the amount stated in the bankruptcy notice was not paid within seven days, an application to set aside the bankruptcy notice under r 17 of the IR 2017 was already filed by the JD before 25 December 2018 through encl 6.

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[24] We pause here to note that encl 6 was not included in the appeal records, but the parties did not dispute that encl 6 is the JD's application to set aside the bankruptcy notice. The parties also did not dispute that encl 6 is still pending for hearing and determination.

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[25] The learned HCJ in his grounds of judgment found that the act of bankruptcy had not yet occurred since encl 6 had not been disposed of. The learned HCJ in his decision also directed for encl 6 to be heard. We agree with the learned HCJ.

- A [26] In our view, the act of bankruptcy did not occur on 25 December 2018, as there is a pending application to set aside the bankruptcy notice. This is regardless of whether the application was made under r 17 of the IR 2017 or otherwise since it comes within the ambit of r 93 of the IR 2017.
- B [27] Therefore, the act of bankruptcy cannot occur until encl 6 is heard and disposed of. Since encl 6 has not been heard and disposed of, the act of bankruptcy has been stayed according to r 93 of the IR 2017 thus it is premature at this stage to argue that the bankruptcy proceeding has terminated especially when the earlier petition was withdrawn with liberty to file afresh
- C and it was allowed by the court as we noted earlier.

CONCLUSION

- D [28] In conclusion, for reasons enumerated above, we have come to a unanimous decision to dismiss this appeal with costs. We further direct the deputy registrar to hear encl 6 the day after this judgment is delivered, as we agree with the learned HCJ that the application under encl 6 should be heard expeditiously.

- E [29] Costs of RM5,000 to be paid by the JD to the JC, subject to allocator.

Appeal dismissed with costs.

- F Reported by Nabilah Syahida Abdullah Salleh

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